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In The

Supreme Court of the United States

October Term, 1995

CITY OF CARLSBAD, BRIAN WATSON, JAMES THOMPSON, FRANK MANNEN, RAYMOND PATCHETT, STEWART GARY and ANN JENSEN,

Petitioners,

v.

WILLIAM EARL WARREN, III,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals, Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) May Respondent proceed to trial on his Title VII (42 U.S.C. section 2000e-2(a)) disparate treatment claim that he was not promoted when he has failed to provide sufficiently controverting evidence to rebut Petitioners' evidence that they did not know of his national origin?

2) May Respondent former City of Carlsbad firefighter William Earl Warren III defeat his employer's motion for summary adjudication of his Title VII (42 U.S.C. section 2000e-2(a)) disparate treatment claim without raising material factual issues, sufficient to meet the requirements of FRCP 56, as to whether the City's legitimate business reasons for failing to promote him were both false *and* a pretext for discrimination?

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JURISDICTION

The judgment of the U.S. Court of Appeals for the Ninth Circuit in *Warren v. City of Carlsbad*, 58 F.3d 439 (9th Cir. 1995) was entered on June 22, 1995. This Court has jurisdiction to review that judgment based upon 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

42 U.S.C. section 2000e-2(a).

(a) Employer practices

It shall be an unlawful employment practice for an employer:

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Fed.R.Civ.P. 56. Summary Judgment.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the

hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

. . .

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denial of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

STATEMENT OF THE CASE

Petitioner, City of Carlsbad, employed Respondent, William Earl Warren III, as a firefighter from January 1973 to May 5, 1990. After placing eighth of twenty candidates taking the fire captain's promotional exam in October 1988, Respondent was one of fourteen candidates selected for the promotion list and considered for promotion in the first half of 1989. Pursuant to Rule VIII, Section 5 of Petitioner City's Personnel System Rules and Regulations, Petitioner Fire Chief Thompson has the authority to interview the eligible candidates from the list and, based on that interview, appoint any of the candidates regardless of ranking on the list. (CR 24, para. 5; CR 27, Ex. P, para. 10.)

Three candidates were promoted in January 1989, one of whom had a lower exam score than Respondent by less than three points. Three more were promoted in May 1989, one of whom also had a lower exam score than Respondent by less than three points. Three white male candidates with test scores better than Respondent's were also passed over for promotion on both occasions. (CR 27, Ex. P, paras. 10 and 11.)

In December 1989, Respondent's psychologist, Dr. David A. Gilder, reported to the City that the Respondent was having homicidal fantasies about Fire Chief James Thompson and that Respondent was generally incapable of performing his job at that time. After confirmation from two other doctors, the City determined that it was necessary to retire the Respondent effective May 5, 1990 for disability as required by the Public Employees Retirement System, and Respondent was then taken off the

promotion candidate list. (CR 24, paras. 13-15; CR 27, Ex. P, para. 16.)

In late December 1990, the City received notice that Respondent had filed a Charge of Discrimination with the Equal Employment Opportunity Commission (hereafter EEOC), an agency of experts in the field of discrimination designated by Congress to address this important issue. The Charge alleged that the City passed him over for promotion and retired him because he is Hispanic. (CR 24, Ex. E.) Uncontested evidence presented to the District Court established that this was the first time any defendant to this suit knew that Mr. Warren was Hispanic. (CR 41, 3:13-18; CR 24, 4:18-5:8 and Ex. E; CR 27, Exs. K (Warren Depo. at 24:6-25:10, 26:20-28:25), L, M and O (Thompson Depo. at 42:7-43:23 and 122:1-125:7); CR 25, 1:27-2:5; CR 26, 1:26-2:4; CR 28, 1:25-2:3, CR 29, 2:1-6.) Respondent supplied the EEOC with the names of department employees who would support his claim that the City discriminated against him because he is Hispanic. (CR 27, Ex. M.) Following its investigation, the EEOC informed the Respondent that none of the witnesses supported his allegations. (CR 27, Ex. M.)

Undeterred, the Respondent filed the present action in the United States District Court for the Southern District of California on March 9, 1992 alleging eight causes of action. Federal jurisdiction was based on a claim of disparate treatment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. sections 2000e, *et seq.* (Respondent's CR 1.)

The City moved for summary judgment in February 1993. The City provided evidence establishing that none

of the Petitioners knew of Respondent's protected status until December 1990, that Chief Thompson's evaluation of the Respondent revealed that he had leadership and interpersonal deficiencies which precluded his promotion, and that Respondent's confessed psychological difficulties made him unfit for any kind of duty. (Respondent's CR 21.)

The U.S. District Court of the Southern District of California granted Petitioners' motion for summary judgment and ruled that Respondent could not state a claim under Title VII. The Court found no evidence to suggest that the Petitioners were aware that Respondent was Hispanic. The Court further found that Respondent failed to show that Petitioner City's legitimate business reasons were pretexts for discrimination. The Court also relied on the fact that the EEOC found no evidence to support the Respondent's charges. (App. 15-27.)

On appeal, the U.S. Court of Appeals for the Ninth Circuit overturned the trial court's decision. The three judge panel concluded that knowledge of Respondent's ethnicity was unnecessary to establish a prima facie case. Instead, the Ninth Circuit relied upon the City's history of minority hiring, the Respondent's hearsay allegation that Petitioner Fire Chief Thompson made a discriminatory remark years before the Respondent was denied promotion, and the fact that Petitioner City utilized a "Rule of the List" promotion selection process to establish an issue of fact sufficient to defeat summary adjudication. The Ninth Circuit failed to address the Respondent's admitted psychological disability. (App. 1-14.)

The City now petitions the U.S. Supreme Court for a writ of certiorari on the grounds that: 1) substantial injustice will result if an employer is required to defend a Title VII case to trial notwithstanding evidence that it was not aware of the employee's membership in a protected classification; and 2) the Ninth Circuit's decision conflicts with this Court's decisions in *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993) and *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) which cumulatively require a Title VII plaintiff to come forward with legally sufficient and admissible evidence of two specific categories of information in order to rebut an employer's legitimate nondiscriminatory reason for an employment decision and defeat the employer's motion for summary adjudication.

ARGUMENT

I. SUBSTANTIAL INJUSTICE WILL RESULT IF EMPLOYERS ARE REQUIRED TO DEFEND TITLE VII CASES NOTWITHSTANDING THAT THEY HAD NO KNOWLEDGE OF A PLAINTIFF'S ETHNICITY

A. The Court's Decision in *Celotex* Requires Summary Adjudication When the Plaintiff Fails to Provide Sufficient Opposition to the Defendant's Motion.

In *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), this Court made clear that a plaintiff opposing a motion for summary adjudication cannot

rest on its pleadings, but must make an affirmative showing on all matters placed at issue by the motion to which it has the burden of proof at trial:

> "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue . . . [Federal Rule of Civil Procedure 56(c)] requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories and admissions on file," [and] designate "specific facts showing that there is a genuine issue for trial". (*Celotex, supra,* 477 U.S. at 324 (citations omitted).)

The "specific facts" that the opposing party designates must be of sufficient weight to create a genuine issue of material fact. The Court has noted that "[The] opponent must do more than simply show that there is some metaphysical doubt as to the material facts." (*Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).) "The mere existence of a scintilla of evidence . . . will be insufficient; there must be evidence on which the jury could *reasonably find* for [the plaintiff]." (*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (emphasis added).)

Accordingly, this Court has confirmed that the plain language of Rule 56(c) mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. (*Celotex*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).) If the opposing

party fails to make such a showing in that circumstance, there can be no "genuine issue of any material fact" to defeat the motion. (*Id.*)

B. Respondent Failed to Produce Evidence Sufficient for a Jury to Determine That Petitioners Knew of Respondent's Ethnicity.

One reason the District Court granted Petitioner's motion for summary adjudication was the absence of any actual evidence that Petitioner City knew that Respondent was Hispanic.[1] (App. 19-20.) Every one of the Petitioners submitted sworn testimony to the District Court stating that they did not know Respondent's national origin until after Respondent had left the department. (CR 24; 25; 26; 27; Ex. O, 122:4-24; 28; and 29.) The fact of his non-Hispanic surname, his European appearance, and Respondent's lack of disclosure earlier in the promotional process are consistent with this lack of knowledge. Respondent himself, in deposition testimony, admitted that he never told Petitioner Fire Chief Thompson that he was Hispanic and he merely "believe[d]" that he mentioned his mother's ethnicity. (CR 27, Ex. K, 27:13-14).[2]

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[1] Respondent attempted to produce such evidence by asking the EEOC to interview certain department employees about their knowledge of Respondent's national origin. During these interviews it became clear that employees either had no knowledge that Respondent was Hispanic, or knew, but believed it was not generally known in the department.

[2] In addition to relying on Respondent's deposition testimony admitting he never told the Chief of his ethnicity, the District Court could also rely on his contrary statements in his sworn declaration to assess Respondent's credibility and/or the

This Court recently emphasized that the purpose of Fed.R.Civ.P. 56 is to grant summary judgment where Respondents can only provide conclusory allegations to support specific facts essential to their claims. (*Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990).) In the present case, the District Court concluded correctly that Respondent could provide only "unsupported beliefs" and not personal knowledge that Petitioners knew of his ethnicity. As in *Lujan*, Fed.R.Civ.P. 56 requires summary judgment.

Both logic and Title VII make it clear that Petitioner's knowledge of Respondent's protected status is absolutely essential in an employment discrimination action. Title VII's purpose is to protect employees from adverse employment decisions taken "because of" the employee's protected status. 42 U.S.C. section 2000e-2(a). Since there was no credible evidence that the Petitioners knew that the Respondent was Hispanic, there is no way they could have discriminated against him "because of" his race or national origin. Such lack of knowledge makes it impossible for a Respondent to state a claim under Title VII. (*Mitchell v. Office of Los Angeles County Superintendent of Schools*, 805 F.2d 844 (9th Cir. 1986), *cert. den.*, 108 S.Ct. 168, 98 L.Ed.2d 122.)

This Court recently explained that Title VII only protects individuals who suffer discrimination *because of* a protected status. (*Hazen Paper Co. v. Biggins*, ___ U.S. ___, 113 S.Ct. 1701, 1705-06, 123 L.Ed.2d 338 (1993).) This is not

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probative value of other statements by Respondent (CR, Ex. K, 27:13-14.)

a new revelation, as the Court has long held that the " 'factual inquiry' in a Title VII case is . . . [whether] the employer treated some people less favorably than others *because of* their race, color, religion, sex or national origin." (*U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 715, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983); *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978).) (Emphasis added.)

Faced with this body of law and a record that is devoid of any actual evidence that Petitioners knew of Respondent's ethnicity, the Ninth Circuit in the present case nevertheless overturned the District Court's grant of summary judgment for Petitioners. It did so on two grounds. First, the Ninth Circuit questioned the relevance under *McDonnell Douglas* of Petitioners' knowledge of Respondent's protected status. It suggested that the District Court had misstated an element required of Respondent under the prima facie case in *McDonnell Douglas*. Somehow this error led the Ninth Circuit to conclude that Petitioners who take action without any knowledge of a Respondent's national origin might still be liable for discrimination based on that unknown origin.

It ought to be clear that Petitioners cannot discriminate "because of" national origin if they are unaware of it. It might be debatable whether this simple logic should be reflected as a failure to state a prima facie, a failure to show pretext or a failure to carry the ultimate burden of showing discriminatory intent. It should not be debatable, however, that summary judgment under Fed.R.Civ.P. 56 is appropriate where there is insufficient evidence that Petitioners knew of the protected status that allegedly was the reason they discriminated.

The second basis cited by the Ninth Circuit to overturn summary judgment on the issue of Petitioners' knowledge of Respondent's ethnicity was to rely on the vague, even contradictory, deposition testimony by Respondent wherein he testified that he "believe[d]" that he had talked to the Chief about his mother's national origin, even though he admits he never told the Chief he was Hispanic. (CR 27, Ex. K, 27:13-14). The Ninth Circuit also relied on Respondent's opinion in his declaration that firefighters are a "tight-knit group," so that everyone knew "everyone else's business" including, presumably, Respondent's national origin. This speculation, of course, is directly contradicted by firefighters who were Respondent's own witnesses, who declared:

1. "I am not personally aware of Mr. Warren's national origin . . . " (Statement of Peter McKenzie, CR 27, Ex. L, 8.)

2. "I did not have knowledge of Warren's Hispanic origin until after he left the department." (Statement of Marc Revere, described by Warren as his "close personal" friend, CR 27, Ex. L, 11.)

3. "I do not believe [Warren's Hispanic origin] is widely known in the Department." (Statement of Ken Kiefer, CR 27, Ex. L, 6.)

The only other testimony presented by Respondent on this issue came from two other firefighters who both said that they had no knowledge as to whether Respondent's national origin was known by others in the department. (Statements of Kim Blaylock and Marc Revere, CR 27, Ex. L, 1, 11.) Obviously, Respondent's own witnesses provide

no evidentiary support for his contention that any Petitioner knew of his ethnicity. As mentioned above, each Petitioner declared under oath that he had no such knowledge. Respondent's showing is insufficient to raise a triable issue of fact regarding Petitioners' knowledge of Respondent's ethnicity.

Whether an inability to show defendant's knowledge of plaintiff's national origin is a failure to make a prima facie case, a failure to show that proffered legitimate reasons are pretextual or a failure to ultimately prove discrimination, the result should be the same. A plaintiff must show by credible evidence that defendant knew of his or her protected status to proceed to trial on a claim of discrimination since without that knowledge it is logically and legally impossible for a defendant to intentionally discriminate *because of* national origin. Failure to prove knowledge of national origin should result in summary judgment under Fed.R.Civ.P. 56 precluding Respondent from proceeding to trial.

II. THE WRIT SHOULD ISSUE TO PREVENT A PLAINTIFF FROM PURSUING A TITLE VII CLAIM CONTRARY TO THE STANDARDS SPECIFIED IN *HICKS* AND *CELOTEX*

This case provides this Court an opportunity to correct a decision from the U.S. Court of Appeals for the Ninth Circuit which disregards the standards that this Court has established in two separate decisions for summary adjudication of a Title VII of the Civil Rights Act of 1964, 42 U.S.C. section 2000e-2(a) claim. Specifically, the decision in *Warren v. City of Carlsbad*, 58 F.3d 439 (9th Cir.

1995) (App. 1-14), (hereafter *Warren*), conflicts with the U.S. Supreme Court decisions in: 1) *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S.Ct. 2742, 2752, 125 L.Ed.2d 407 (1993), which specifies a plaintiff's burden of proof on a Title VII disparate treatment claim; and 2) *Celotex Corp v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), which specifies a party's burden of proof in opposing a motion for summary adjudication.

The Ninth Circuit's opinion in *Warren* conflicts with *Hicks* and *Celotex* because it permitted Respondent Warren to survive summary adjudication without sufficient evidence of *both* the falsity of the Petitioner City's legitimate business reasons for its failure to promote him to the position of fire captain, *and* that those reasons were a pretext for unlawful discrimination.

A. *Hicks* Requires a Title VII Plaintiff to Produce Evidence Regarding Both the Falsity of the Employer's Legitimate Business Reason, and That the Real Reason was Discriminatory.

This Court's decision in *Hicks* is the most recent of several precedents that describe and clarify a plaintiff's burden of proof on a Title VII claim.

The plaintiff in a Title VII action bears the initial burden of coming forward with evidence sufficient to constitute a prima facie case of discrimination. (*Texas Dept. of Community Affairs v. Burdine* (hereinafter *Burdine*), 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).) In order to establish a discriminatory failure to promote, a plaintiff must prove by the preponderance of the evidence that: 1) he belongs to a protected classification; 2)

he was qualified for an available position; 3) he was rejected despite his qualifications; and 4) the position remained open and the employer continued to offer promotions to persons of the plaintiff's qualifications. (*McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).)

If a plaintiff establishes each of the prima facie elements, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its employment decision. (*McDonnell Douglas, supra*, 411 U.S. at 802; *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 714-15, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983).) The employer "need not persuade the court that it was actually motivated by its proffered reasons," but meets this burden simply by producing evidence of nondiscriminatory reasons for its employment action. (*Burdine, supra*, 450 U.S. at 254.)

If the employer sustains this burden of production, the *McDonnell Douglas* framework of presumptions and burdens is no longer relevant, and the trier of fact proceeds to the ultimate question: whether the plaintiff has proven that the employer intentionally discriminated against him because of his race, religion, sex, or national origin. (*Burdine, supra*, 450 U.S. at 253.)

It is at this stage of the Title VII analytical process that the *Hicks* decision comes into play. *Hicks* specifies that an employee can only establish intentional employment discrimination by two separate elements of proof: 1) that the legitimate business reasons the employer articulated for the employment decision were false; *and* 2) that discrimination was the real reason. (*Hicks, supra*, 113 S.Ct.

at 2752.) In reaching this conclusion, the *Hicks* majority opinion specifically rejected the dissenting view that the element of proof as to falsity was one in the same with the element of proof as to whether the employment action was made for discriminatory reasons. (*Id.*) The *Hicks* majority noted that evidence indicating that the employer's reason was false "often considerably assists" the trier of fact to determine whether the plaintiff has met his ultimate burden of proving that the employer intentionally discriminated against him because of his protected status. (*Id.*)

The *Hicks* opinion dismissed, as "dicta," language in prior U.S. Supreme Court decisions that appeared to require proof of only one of these two elements. (*Id.*, at 2751.) Instead, *Hicks* emphasizes that a plaintiff cannot meet his/her burden of proving intentional Title VII employment discrimination without evidence that the employer's proffered legitimate business reason for its employment action was *"both* . . . false, *and* that discrimination was the real reason." (*Id.*, at 2752 (original emphasis).)

B. The Ninth Circuit's Decision in *Warren* Conflicts With *Hicks* and *Celotex* Because it Improperly Excuses a Title VII Plaintiff From Producing Evidence Sufficient to Create Triable Issues of Discriminatory Pretext.

The Ninth Circuit's decision in *Warren* should not be permitted to stand because it contradicts the standards that this Court's decisions in *Hicks* and *Celotex* have established for granting summary adjudication motions

in Title VII cases. The Ninth Circuit allowed Respondent Warren to evade Petitioners' summary adjudication motion, notwithstanding that Respondent Warren failed to come forward with evidence sufficient to establish *both* that Petitioner City's legitimate business reasons for selecting others for promotion were false, *and* that the reason for its action was because of his Hispanic national origin.

1. Respondent Warren Failed to Show That Petitioner City's Legitimate Business Reasons for its Decision Not to Promote Him Were False.

Petitioners articulated two legitimate business reasons for their decision to select others for promotion over Respondent Warren: 1) that others were more qualified for promotion because Respondent Warren was inflexible and lacked the type of judgment and communication skills necessary for promotion to a leadership position; and 2) that Petitioner Warren's disability retirement, which resulted from his "intense homicidal ideations directed against Chief James Thompson," properly resulted in his name being removed from the list of candidates for promotion. Petitioners fully supported each of these facts with admissible evidence.

The Ninth Circuit failed to properly follow *Hicks* since it failed to require this showing.

2. The Evidence of Pretext That the Ninth Circuit Identified Were Not Legally Sufficient to Evade Summary Adjudication.

In determining that there were material issues of fact sufficient to defeat summary judgment, the Ninth Circuit relied on the fact that: (1) Respondent's communication skills were subjectively evaluated; (2) Respondent alleged that Petitioner Fire Chief Thompson made a single, isolated comment years before the decision not to promote Respondent; and (3) Respondent's recollection of Petitioner City's minority hiring practices over the past nineteen years showed underrepresentation of minorities. None of these factors is sufficient to raise a material issue of fact sufficient to defeat summary judgment under either Federal Rule of Civil Procedure 56 or U.S. Supreme Court precedent.

(A) A Subjective Evaluation is Not Legally Sufficient to Raise a Genuine Issue of Material Fact Sufficient to Defeat Summary Judgment.

The Ninth Circuit found that Petitioner Fire Chief Thompson's subjective evaluation of Respondent's communication skills was sufficient to defeat Petitioners' motion for summary judgment. (*Warren v. City of Carlsbad*, 58 F.3d 439, 443 (9th Cir. 1995).)

However, the use of subjective criteria in an employment decision is insufficient to shift the burden of proof that *McDonnell Douglas* and its progeny place on a plaintiff. (*Burdine, supra*, 450 U.S. at 253.) In *Burdine*, the Circuit Court had overturned the District Court's judgment

for the employer explaining that the employer's evidence was insufficient because the employer "failed to specify any objective criteria on which [it] based the decision to discharge Burdine and retain Waltz. . . . Nothing in the record indicates whether [the employer] examined Waltz's ability to work well with others." (*Id.*, at 257 n. 11.) In reversing this decision, this Court explained that the articulation of a legitimate business reason, even though it involves subjective criteria, is sufficient to shift the burden to plaintiff to prove intentional discrimination either by persuading the court that a discriminatory reason more likely motivated the employer or by showing indirectly that the employer's proffered explanation is unworthy of credence. (*Id.*, at 256-258.)

In the present case, the Ninth Circuit relied on the mere fact of a subjective evaluation to reject the City's proffered legitimate business reason for not hiring Respondent without requiring Respondent to produce any evidence that the decision was either motivated by discriminatory animus or inherently unworthy of credence. Such reliance is directly contrary to the Court's decision in *Burdine*. The ultimate burden remains with Respondent to provide evidence of discrimination which Respondent has failed to do.[3]

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[3] We note that the City's proffered business reason was based only in part on subjective criteria. The City's decision not to promote Respondent was also based in part on his disabling psychiatric condition. Respondent conceded that the City was justified in retiring him after his own psychiatrist reported his "intense homicidal ideations" toward the Chief. After this report, Respondent was no longer considered for a promotion.

(B) A Single, Isolated Statement Allegedly Made Years Prior to the Promotion Decision is Not Legally Sufficient to Defeat Summary Judgment.

The Ninth Circuit also found that an alleged single, isolated, discriminatory remark not directed at any individual, and allegedly made years prior to the employment decision, was sufficient to defeat Petitioners' Motion for Summary Judgment. (*Warren, supra*, 58 F.3d at 444.)

In order to defeat summary judgment, Respondent must identify facts of sufficient weight to create a genuine issue of material fact.

> "The mere existence of a scintilla of evidence . . . will be insufficient [to defeat summary judgment]; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict . . . " (*Anderson, supra*, 477 U.S. at 252.)

This standard applies to all cases regardless of the nature of the underlying claim. (*Id.*, at 258 n.1 (Brennan, J., dissenting).)

This one isolated statement made years prior to the decision not to promote Respondent does not satisfy Respondent's burden for avoiding summary judgment. The only evidence which the Ninth Circuit could have relied upon regarding this statement was Respondent's declaration in which he states "On at least one occasion, I

personally heard THOMPSON make a derogatory comment [sic] Hispanics." (CR 36, 4:27-5:1.) Respondent has failed to set forth a sufficient basis for the introduction of this personal opinion that a comment was derogatory since he provides no facts to determine whether this was based on first-hand knowledge or observation. (Fed.R.Evid. 701.) The record before the Ninth Circuit did not even describe what the allegedly derogatory comment was. Moreover, the fact that this statement was made years prior to the decision not to promote Respondent demonstrates that it is inherently unreliable as evidence. There is no evidence to suggest a causal connection between this alleged, unidentified statement and the promotional decision. Such a comment does not indicate that there was racial animus directed towards Respondent, and has no bearing on Petitioner City's legitimate business reason in denying him the promotion.

(C) Respondent Cannot Rely on Vague and Conclusory Statements Regarding Petitioner City's Minority Representation.

The Ninth Circuit found that statistics regarding the Petitioner City's minority representation during the last nineteen years demonstrated that Petitioner City's legitimate business reasons were pretextual. (*Warren, supra,* 58 F.3d 439, 443 (9th Cir. 1995).) This reliance on improper and irrelevant statistical comparisons is contrary to United States Supreme Court precedent regarding the proper role of statistics in employment discrimination

cases and legally insufficient to constitute evidence of pretext.

A public agency must rely on more than vague allegations concerning discriminatory hiring practices before it can enact an affirmative action plan to remedy discrimination. (*City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 498-503, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (a generalized assertion of past discrimination cannot justify remedial action); *Adarand Constructors, Inc. v. Pena*, ___ U.S. ___, 115 S.Ct. 2097, 2113, 132 L.Ed.2d 158 (1995) (imposing strict scrutiny on public agency actions designed to remedy discrimination).) This is because generalized statistics require supporting data showing context, reliability and relevance before they can raise an inference probative of discriminatory motive. (*Hazelwood School Dist. v. U.S.*, 433 U.S. 299, 308, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977).) "Small or incomplete data sets and inadequate statistical techniques" are weaknesses which may impeach the reliability of statistical evidence. (*Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 996-997, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988) *abrogated on other grounds, Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 659-660, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989).) Moreover, statistics based on an applicant pool of individuals lacking the special qualifications required to fill a particular position are "of little probative value." (*Id.*; *Hazelwood, supra*, 433 U.S. at 309 n. 13.)

In the present case, the Ninth Circuit has relied on Respondent's own personal recollection as to the composition of the workforce "over the years" as "statistical" evidence of discrimination, (CR 36 at 4:11-17), even though Petitioner City would be precluded from relying

on this same data to enact an affirmative action plan to remedy that discrimination.[4] Respondent has provided no foundation to suggest that his "statistics" are relevant to the issue before the Court, nor any evidence of the relevant labor pool, applicant flow data or specific time periods to which Respondent refers. This is not the statistical evidence found to be probative of discrimination in *Hazelwood* and cannot serve as a basis for pretext.

C. Respondent Failed to Produce Sufficient Evidence of a "Mixed Motive" to Proceed to Trial.

As described above, Respondent failed to satisfy the requirement imposed by this Court in *Hicks* to provide evidence that the legitimate business reasons offered by Petitioners were false to show pretext. Although not raised before the Ninth Circuit, Respondent may now argue that he need not show pretext to survive summary judgment. Instead, he may contend that even if he failed to show the Petitioner City's reasons were false as required by *Hicks*, he nevertheless has shown a discriminatory reason for Petitioners' action and such a showing creates a dual or "mixed motive."

If Respondent asserts that this is a "mixed motive" case, and he is thereby relieved of any requirement to challenge Petitioners' reasons, his argument will be unavailing. In *Price Waterhouse v. Hopkins*, 490 U.S. 228,

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[4] The Ninth Circuit relied on Petitioner City's alleged failure to hire minorities over the years although Petitioner City *did* hire Respondent. Clearly, Petitioner would not even have standing to contest those hiring practices since he suffered no injury as a result of those practices.

109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), this Court held that an employer cannot be liable for discrimination if it would have taken the same personnel action without regard to the allegedly prohibited reason. (*Id.*, at 244-245.)

In the present case, Petitioners have shown that they did not promote Respondent because of: (1) his inability to communicate and cooperate with superiors in the chain of command and make judgment calls where there did not appear to be a "right" answer; and (2) the fact that he was properly retired based upon the opinions of three physicians, including Respondent's own psychiatrist, that he was unfit for duty. (CR 27, Ex. M.)

Despite this evidence, Respondent may contend that he has shown that discrimination was a separate reason for Petitioners' action in not promoting him. To support that contention, he can rely only on his own personal recollection of minority underrepresentation in City hiring, his bald assertion that Petitioner Fire Chief Thompson made a derogatory remark years before he was denied promotion, and the fact that Petitioner City may have utilized a subjective evaluation process to assess Respondent's lack of communication skills. Of these allegations, however, only the subjective evaluation actually deals with the promotional process. No reasonable jury could conclude that this scant evidence supports a finding that discrimination was the motivating reason for the decision not to promote Respondent. (*See, Anderson v. Liberty Lobby, Inc., supra,* 477 U.S. at 252.) As a result, the holding of *Price Waterhouse* compels a ruling in favor of Petitioners.

CONCLUSION

For the reasons cited, the Ninth Circuit's decision herein will create a substantial injustice for employers required to proceed to trial when a plaintiff has made a showing as minimal as the one made by Respondent herein. Further, the Ninth Circuit's decision directly conflicts with this Court's decisions in *Celotex* and *Hicks*. For these reasons, it is respectfully requested that a writ of certiorari issue.

Dated: September 20, 1995

Respectfully submitted,

WHITMORE, JOHNSON & BOLANOS

RICHARD S. WHITMORE
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Attorneys for Petitioners City of Carlsbad, Brian Watson, James Thompson, Frank Mannen, Raymond Patchett, Stewart Gary and Ann Jensen

William Earl WARREN III,
Plaintiff-Appellant,

v.

CITY OF CARLSBAD; Brian Watson; James Thompson; Frank Mannen; Raymond Patchett; Stewart Gary; Ann Jansen, Defendants-Appellees.

No. 93-55749.

United States Court of Appeals,
Ninth Circuit.

Submitted June 9, 1995.*

Decided June 22, 1995.

Fire fighter brought suit against city and city employees, alleging that defendants violated Title VII by not promoting him to position of fire captain because of his Mexican national origin. The United States District Court for the Southern District of California, William B. Enright, J., entered summary judgment in favor of defendants, and imposed Rule 11 sanctions on plaintiff for filing frivolous claim. Plaintiff appealed. The Court of Appeals, Pregerson, Circuit Judge, held that: (1) district court erred when it found that plaintiff failed to present prima facie case; (2) plaintiff raised genuine factual questions material to determining whether discrimination motivated denial of promotion, precluding summary

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* The panel unanimously found this case suitable for decision without oral argument. Fed.R.App.P. 34(a); Ninth Cir.R. 34-4.

judgment; (3) district court abused its discretion when it imposed Rule 11 sanctions.

Reversed and remanded.

Thomas R. Gill, San Diego, CA, for plaintiff-appellant.

Cynthia O'Neill, Whitmore, Johnson & Bolanos, Mountain View, CA, for defendants-appellees.

Appeal from the United States District Court for the Southern District of California.

Before: PREGERSON, POOLE, and D.W. NELSON, Circuit Judges.

PREGERSON, Circuit Judge:

Plaintiff William Earl Warren III appeals the district court's grant of summary judgment in favor of defendants, the City of Carlsbad and city employees (collectively "the City"), and the district court's grant of Fed.R.Civ.P. 11 sanctions against him and Thomas Gill, an attorney (not of record) who helped him with the case. Warren alleges that the defendants violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. ss 2000e *et seq.*, by not promoting him to the position of fire captain because of his national origin. We reverse.

FACTS

Warren worked for the City of Carlsbad as a fire fighter from January 29, 1973 until his discharge on May 4, 1990. In October 1988, Warren took a promotional test

for the position of fire captain. He scored 8th highest out of the twenty applicants who took the test. An outside consulting firm conducted the test which included a fire simulation, an "in-basket" exercise, and an evaluation of certain record-keeping and communication skills. Besides Warren, who is of Mexican descent, all the other applicants for the position of fire captain were white.

The twenty applicants, ranked in order by their performance on the test, became the "employment list" from which Fire Chief James Thompson made promotions. In January and May 1989, the Fire Chief appointed six of the applicants to the position of fire captain. Four of those appointed scored higher than Warren on the exam and ranked 1st, 2nd, 5th, and 7th. Two others appointed scored lower and were ranked 9th and 11th.

On December 19, 1989, Warren's psychiatrist notified the Fire Chief that Warren suffered from depression and that he had "intense homicidal ideas" about the Fire Chief. Warren attributes his depression to being passed over for a promotion because of his national origin. The City immediately placed Warren on administrative leave. After he was examined by two other doctors, the City placed Warren on disability leave starting on May 5, 1990. Warren did not challenge the City's determination that he was not able to carry out the duties of a fire fighter. Once his disability leave began, Warren was no longer eligible for a promotion to fire captain and was taken off the list.

On December 17, 1990, Warren filed a charge of employment discrimination against the City with the Equal Employment Opportunity Commission (EEOC),

alleging *inter alia* that the City had denied him a promotion to fire captain in January and May 1989 because of his Mexican national origin. On December 9, 1991, the EEOC issued Warren a right-to-sue letter at his request. On March 9, 1992, Warren filed this suit in the United States District Court for the Southern District of California.

Throughout the proceedings before the district court, Warren was assisted by Thomas Gill, a lawyer, who helped him draft his complaint but did not sign it. The district court granted summary judgment in favor of the City, finding that the City had not discriminated against Warren. The district court also imposed Fed.R.Civ.P. 11 sanctions of $5,000 each against Warren and Gill for filing a "frivolous" claim. Warren now appeals.

ANALYSIS

A. Standard of Review.

We review a grant of summary judgment de novo. *Jesinger v. Nevada Fed. Credit Union*, 24 F.3d 1127, 1130 (9th Cir.1994). We must determine whether the evidence, viewed in a light most favorable to the non-moving party, presents any genuine issues of material fact and whether the district court correctly applied the law. *Id.* Summary judgment is only proper if no material factual issues exist for trial. *Lindahl v. Air France*, 930 F.2d 1434, 1436 (9th Cir.1991).

We review the imposition of Rule 11 sanctions for an abuse of discretion. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S.Ct. 2447, 2460-61, 110 L.Ed.2d 359

(1990); *Newton v. Thomason*, 22 F.3d 1455, 1463 (9th Cir.1994).

B. Employment Discrimination Claims.

A plaintiff can establish a prima facie case of race discrimination under Title VII by establishing that (1) he or she belongs to a racial minority; (2) he or she applied and was qualified for a job for which the employer was seeking applicants; (3) he or she was rejected for the position despite his or her qualifications; and (4) the position remained open after his or her rejection and the employer continued to seek applications from other people with similar qualifications to the plaintiff. *McDonnell Douglas v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973).[1] In *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093-94, 67 L.Ed.2d 207 (1981), the Supreme Court stated that "[t]he burden of establishing a prima facie case of disparate treatment is not onerous."

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[1] A plaintiff can also establish a prima facie case by "offering evidence adequate to create an inference that an employment decision was based on a discriminatory criteria illegal under [Title VII]." *Mitchell v. Office of the Los Angeles County Superintendent of Schools*, 805 F.2d 844, 846 (9th Cir.1986) (quoting *Teamsters v. United States*, 431 U.S. 324, 358, 97 S.Ct. 1843, 1866, 52 L.Ed.2d 396 (1977)); *see Lowe v. City of Monrovia*, 775 F.2d 998, 1006 (9th Cir.1985) (plaintiff can establish prima facie case of disparate treatment without satisfying McDonnell Douglas test if he or she provides evidence suggesting rejection was based on discriminatory criteria), *amended*, 784 F.2d 1407 (1986). A plaintiff who provides such evidence for his or her prima facie case may be able to survive summary judgment on this evidence alone. *Lowe*, 775 F.2d at 1008.

After the plaintiff has established a prima facie case, the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for the plaintiff's rejection. *Id.* If the employer sustains the burden, the plaintiff then has the opportunity to present evidence showing that the employer's stated reason for the rejection was merely pretextual. *Id.*; *see also McDonnell Douglas*, 411 U.S. at 807, 93 S.Ct. at 1826-27; *Lindahl*, 930 F.2d at 1437 ("The defendant's articulation of a legitimate non-discriminatory reason serves . . . to shift the burden back to the plaintiff to raise a genuine factual question as to whether the proffered reason is pretextual.") (quoting *Lowe*, 775 F.2d at 1008).

The district court found that Warren failed to establish a prima facie case. The district court's analysis was flawed. First, the district court recited the *McDonnell Douglas* four-part test incorrectly. The third step does not require that a plaintiff prove that "he was rejected because of his protected status." The plaintiff must only show in step three that "despite his qualifications, he was rejected." *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1824. The two standards are quite different. The *McDonnell Douglas* test merely requires that a plaintiff raise an *inference* of disparate treatment to establish a prima facie case, not *actual proof* of such treatment. The district court incorrectly transformed a single threshold factor into the ultimate question to be decided.

Having started with this incorrect legal standard, the district court found that "the plaintiff cannot establish the elements of a prima facie case because he cannot establish that the reason for his rejection was his national origin." But under *McDonnell Douglas*, to establish his prima facie

case, Warren need not prove that discrimination was the motivating factor in his dismissal. All he must do is raise an inference that such misconduct occurred. Under the correct legal standard, Warren did allege facts sufficient to establish a prima facie case.

First, Warren belongs to a protected class because he is of Mexican descent. Second, he was found to be "substantially qualified" for the position of fire captain through testing. Third, he was turned down for the promotion despite his high rank on the promotion list. And fourth, several positions of fire captain remained open after Warren was passed over for the promotion. The district court erred when it found that Warren failed to present a prima facie case under *McDonnell Douglas*.

The district court found that even if Warren had met his burden of establishing a prima facie case, the defendants rebutted that case by offering legitimate, nondiscriminatory reasons for not promoting him. The district court also concluded that Warren had not raised a genuine issue of fact as to whether those reasons were pretextual.

Initially, the district court found that the defendants did not know that Warren was of Mexican descent. Warren refutes this finding convincingly, pointing to his own and other affidavits that show that at least certain members of the department, including Warren's supervisor, knew of his national origin. Warren claims that Fire Chief Thompson knew of his ethnicity both because it came up in conversations Warren had with him and because the fire fighters were a tight-knit group that share personal information about one another among themselves.

The district court found that even if the Fire Chief had known of Warren's Mexican heritage, there was no evidence to suggest that Warren's national origin was the reason the Fire Chief did not promote him. The City claimed that it did not promote Warren because others were more qualified. The district court found this reason to be legitimate, pointing to affidavits of co-workers that suggested that Warren was not promoted because he was inflexible and lacked interpersonal skills. The district court concluded that Warren had not raised a genuine issue as to whether the City's proferred reason for his rejection were pretextual.

Although "the mere existence of a *prima facie* case, based on the minimum evidence necessary to raise a *McDonnell Douglas* presumption, does not preclude summary judgment," *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 890 (9th Cir.1994), "the plaintiff [who has established a prima facie case] need produce very little evidence of discriminatory motive to raise a genuine issue of fact" as to pretext. *Lindahl*, 930 F.2d at 1437. In fact,

> any indication of discriminatory motive . . . may suffice to raise a question that can only be resolved by a factfinder. Once a *prima facie* case is established . . . summary judgment for the defendant will ordinarily not be appropriate on any ground relating to the merits because the crux of a Title VII dispute is the elusive factual question of intentional discrimination.

Id. at 1438 (quoting *Lowe*, 775 F.2d at 1009) (citation omitted). Thus, Warren's burden at the summary judgment stage is not great. He cannot, however, rely on generalizations. He must produce evidence of facts that

either directly show a discriminatory motive or show that the City's explanation for his rejection is not credible. *Id.; accord Krenik v. County of Le Sueur,* 47 F.3d 953, 958 (8th Cir.1995). We conclude that Warren has raised genuine factual questions material to determining whether discrimination motivated his rejection.

Warren first presented statistics to show that the reasons the City gave for not promoting him were pretextual. *See McDonnell Douglas,* 411 U.S. at 805, 93 S.Ct. at 1825-26 (suggesting that statistics as to an employer's employment policy and practice "may be helpful" in establishing that a particular employment decision was in conformance with a general pattern of discrimination); *Lowe,* 775 F.2d at 1008 (same); *Diaz v. AT & T,* 752 F.2d 1356, 1363 (9th Cir.1985) (same). The record reflects that only two men of color work in the entire Carlsbad fire department, and that they occupy the lowest ranking positions. Furthermore, of the twenty five fire fighters who have served as fire captain over the past nineteen years, only one was a member of a minority group. Next, Warren alleged that he "personally heard [Fire Chief] Thompson make a derogatory comment [about] Hispanics." *See Lindahl,* 930 F.2d at 1439 (finding that supervisor's remarks indicating sexual stereotyping create inference of discriminatory motive); *Lowe,* 775 F.2d at 1009 (suggesting that a discriminatory remark can create inference of discriminatory motive).

We also note that the City's proffered reason for not having promoted Warren is based on Fire Chief Thompson's subjective evaluation of Warren's communication skills. Although "in many situations, [subjective criteria] are indispensable to the process of selection in

which employers must engage," *Sengupta v. Morrison-Knudsen Co.*, 804 F.2d 1072, 1075 (9th Cir.1986), Warren was never evaluated formally on his ability to work with people. We have previously stated that "subjective practices are particularly susceptible to discriminatory abuse and should be closely scrutinized." *Jauregui v. City of Glendale*, 852 F.2d 1128, 1136 (9th Cir.1988) (quoting *Atonio v. Wards Cove Packing Co., Inc.*, 810 F.2d 1477, 1481 (9th Cir.1987) (en banc)).

Viewing all the evidence in a light most favorable to Warren and "resolving all inferences in [his] favor, as we must," *Lowe*, 775 F.2d at 1009, we conclude that Warren has raised a genuine issue of material fact as to the City's motive in rejecting him. Despite his qualifications, Warren was not hired while non-minority applicants who ranked below him on the employment list were hired. This fact, together with the statistical evidence regarding the City's "general policy and practice with respect to minority employment," *McDonnell Douglas*, 411 U.S. at 804-05, 93 S.Ct. at 1825, the subjective criteria used in hiring, and the allegation of a racist remark, raise a genuine issue of material fact as to the City's motive in rejecting Warren. Thus, we conclude that summary judgment was granted improperly on Warren's Title VII claim.

C. Rule 11 Sanctions.

Warren also appeals the district court's imposition of Rule 11 sanctions against him and Thomas Gill, the attorney (not of record) who helped him with his case in the district court. We find that the district court abused its discretion when it imposed these sanctions.

Federal Rule of Civil Procedure 11 provides that a district court may sanction attorneys or parties who submit pleadings for an improper purpose or that contain frivolous arguments or arguments that have no evidentiary support.[2] The district court first discussed the possibility of awarding attorneys' fees pursuant to 42 U.S.C. § 2000e-5(k), but then imposed Rule 11 sanctions. The district court found that Warren's claim "is clearly frivolous because plaintiff has submitted no evidence of discrimination other than his personal opinion. . . . "

We disagree. Warren submitted statistical evidence suggesting possible bias in the fire department. The record contains affidavits showing that several people at the fire department were aware of Warren's Mexican heritage. The record also reveals test scores showing that Warren was qualified for the promotion. Warren made out a prima facie case of disparate treatment and also offered evidence raising a genuine issue of material fact as to pretext. Even if the district court had correctly

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[2] Fed.R.Civ.P. 11 was amended after the district court issued its disposition. The version in effect when this case was before the district court provided that:

> The signature of an attorney or party constitutes a certificate by the signer . . . that to the best of the signer's knowledge . . . [the pleading or motion] is well grounded in fact and is warranted by existing law or a good faith argument for the extension . . . of existing law . . . and that it is not interposed for any improper purpose. . . . If a pleading . . . is signed in violation of this rule, the court, upon motion, or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction. . . .

found this evidence to be insufficient for purposes of summary judgment, that "does not mean that appellants' claims were factually unfounded for purposes of Rule 11." *Stitt v. Williams*, 919 F.2d 516, 527 (9th Cir.1990).

We have previously held that a district court may impose monetary sanctions, in the form of attorneys' fees, upon plaintiffs who file Title VII claims that are "frivolous, unreasonable, or without foundation." *See EEOC v. Bruno's Restaurant*, 13 F.3d 285, 287 (9th Cir.1993) (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421-22, 98 S.Ct. 694, 700, 54 L.Ed.2d 648 (1978)). However, we specifically instructed that "[b]ecause Congress intended to 'promote the vigorous enforcement of the provisions of Title VII,' a district court must exercise caution in awarding fees to a prevailing defendant in order to avoid discouraging legitimate suits that may not be 'airtight.' " *Id.* (quoting *Christiansburg*, 434 U.S. at 422, 98 S.Ct. at 700-701); *see also EEOC v. Consolidated Serv. Sys.*, 30 F.3d 58, 59 (7th Cir.1994) (suggesting that the "frivolous" standard is much more stringent than merely "not substantially justified"). This same standard must apply to an assessment of Title VII claims under Rule 11, lest this Rule be used to thwart Congress's intent. Courts must heed "the Supreme Court's warning in Christiansburg against the 'temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation.' " *Bruno's Restaurant*, 13 F.3d at 290 (quoting *Christiansburg*, 434 U.S. at 421-22, 98 S.Ct. at 700-701); *see also Forsberg v. Pacific Northwest Bell Tel. Co.*, 840 F.2d 1409, 1422 (9th Cir.1988) (applying the same "frivolous,

unreasonable, or without foundation" standard to request for sanctions under Rule 11 and 42 U.S.C. § 2000e-5(k)).

Warren made a prima facie showing of Title VII disparate treatment under *McDonnell Douglas*. He also raised additional facts that may point to a discriminatory motive for his rejection. Therefore, the district court's conclusion that Warren's case was "clearly frivolous" is incorrect. *See Marquart v. Lodge 837, Int'l Assoc. of Machinists & Aerospace Workers*, 26 F.3d 842, 853 (8th Cir.1994) (suggesting that a plaintiff who makes out a prima facie case under Title VII cannot be found to have presented a claim that is "frivolous, unreasonable, or groundless"); *Kizer v. Children's Learning Ctr.*, 962 F.2d 608, 613 (7th Cir.1992) (affirming a district court's decision not to impose Rule 11 sanctions on a plaintiff who had failed to make out a prima facie case under Title VII because the claim was not filed with improper motives or inadequate investigation).

We need not determine whether the district court had the authority to impose sanctions against Gill, the attorney helping Warren, even though Gill did not sign the pleadings, because we find that sanctions are not appropriate in any case. Accordingly, we reverse the district court's imposition of sanctions under Rule 11.[3]

CONCLUSION

We find that the district court erred in concluding that no factual issues existed for trial as to Warren's Title VII claim. We also find that the district court abused its

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[3] We also deny the appellees' request for attorneys' fees on appeal pursuant to 42 U.S.C. s 2000e-5(k).

discretion in imposing Rule 11 sanctions against Warren and Gill. Reversed and remanded.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

WILLIAM EARL WARREN III, Plaintiff, v. CITY OF CARLSBAD, BRIAN WATSON, JAMES THOMPSON, FRANK MANNEN, RAYMOND PATCHETT, STEWART GARY, and ANN JENSEN, Defendants.	Civil No. 92-0362-E (CM) **MEMORANDUM DECISION AND ORDER** (Filed April 21, 1993)

BACKGROUND

In this action, plaintiff Warren seeks judicial relief for his failure to receive promotion to Fire Captain. This is the third judicial forum in which plaintiff has sought such relief. Plaintiff already contended in two California courts that the City had both violated its rules and passed him up for promotion in order to retaliate against him for filing grievances. Both the Superior Court and the Court of Appeals dismissed plaintiff's claims based upon the City's evidence that the plaintiff remained eligible for promotion until he was retired for disability. The Court of Appeal affirmed that the City had fully complied with all rules and that there was no reprisal.

In this court, plaintiff now offers his Hispanic national origin as the reason for his treatment. In essence, he argues that because the Chief is prejudiced against Hispanics and there are few minorities in the department,

he was discriminated against on the basis of his race. Defendants argue that plaintiff's current challenge is clearly frivolous because none of the defendants knew plaintiff was Hispanic before his termination.

In October 1988, plaintiff took a fire captain promotional examination which placed him eighth on an eligibility list of fourteen other firefighters. Pursuant to City Personnel System Rules and Regulations, Fire Chief Thompson had the discretion to promote any one of the fourteen candidates on the list, regardless of their examination score ranking.

In January and May 1989, the Fire Chief made six Fire Captain appointments after reviewing the performance evaluations and examination papers of the eligible candidates and discussing the candidates with their supervisors. Four of those appointed had exam scores higher than plaintiff and two had exam scores of 2-3 points lower than plaintiff. The Chief claims that he did not select plaintiff for promotion due to plaintiff's demonstrated inability to communicate and cooperate with the Chief, plaintiff's intolerance of criticism of his work, and his inflexible attitude regarding departmental procedures.

In July 1989, plaintiff filed a grievance alleging the City passed him over for promotion in retaliation for filing grievances in 1987. The City denied plaintiff's grievance pursuant to City rules that the failure to receive promotion is not grievable.

In December 1989, plaintiff's psychiatrist, Dr. Gilder, told the Fire Chief that plaintiff dreamed of killing the Chief and that the threats were serious. He told the Chief

that plaintiff should not remain in the workplace because he developed angry feels whenever he became involved in fire activities.

The City followed Dr. Gilder's advice and placed plaintiff on administrative leave. Two other physicians determined that plaintiff lacked the physical capacity to perform work duties. Based upon these medical opinions, the City retired plaintiff for disability as required by the Public Employees Retirement System ("PERS") law. Plaintiff did not challenge the City's determination of his incapacity to work as a firefighter.

In December 1990, the City received notice that plaintiff had filed an EEOC charge alleging that the City had both passed him over for promotion and retired him due to discrimination based upon his Hispanic origin. Defendants have submitted evidence that prior to the receipt of this charge, none of the defendants were aware that plaintiff was Hispanic.

Thus, defendants moved for summary judgment of plaintiff's seventh cause of action for violation of Title VII. Moreover, they request that this court dismiss the remaining state law claims since the Title VII claim is the only claim which gives this court jurisdiction.

Defendants request attorneys' fees and sanctions to compensate them for defending this action. They argue that both plaintiff and his attorney continued to prosecute this action despite their knowledge that none of the defendants were aware of plaintiff's Hispanic status, and that no evidence links plaintiff's national origin to either his failure to receive promotion or to his disability retirement.

DISCUSSION

A. Legal Standard

Federal Rule of Civil Procedure 56(c) mandates the entry of summary judgment against a party which "fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The party moving for summary judgment bears the burden of proving that there is no genuine issue of material fact and that judgment may be entered as a matter of law. *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987). "[A] party opposing a properly supported motion for summary judgment . . . 'must set forth specific facts showing that there is a genuine issue for trial.' " *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (*citing* Fed. R. Civ. P. 56(e)) (footnotes omitted).

B. Prima Facie Case

Since he abandoned both his disparate impact claim and his challenge to his disability retirement in his opposition, plaintiff's failure to receive promotion to fire captain now constitutes the sole basis for his claim. In order to prove a discriminatory failure to promote, a plaintiff must prove by a preponderance of the evidence that 1) he is a member of a protected group; 2) he was qualified for an available position; 3) he was rejected because of his protected status; and 4) the position remained open and the employer continued to make promotions. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Summary adjudication is appropriate if the plaintiff fails to allege

"specific facts" that establish the existence of a prima facie case. Defendants persuasively argue that plaintiff cannot establish the elements of a prima facie case because he cannot establish that the reason for his rejection was his national origin.

1. Rejection Because of Protected Status

a) Knowledge of National Origin

The foundation element of a Title VII claim is that the employer took the adverse action "because of" the employee's race, color, religion or national origin. 42 U.S.C. § 2000e2(a). The fact that the employer was not aware of the plaintiff's protected status is fatal to the Title VII claim. *Mitchell v. Office of Los Angeles Cty. Sup. of Schools,* 805 F.2d 844 (9th Cir. 1986).

The defendants present evidence that none of them knew that plaintiff was Hispanic until the City received notice of plaintiff's EEOC charge in December 1990. This was six months after plaintiff left work pursuant to his disability retirement. The City does not require job applicants to disclose their national origin as part of the employment process and nothing in plaintiff's personnel file indicated that plaintiff was of Hispanic national origin.

Defendants note that even the witnesses plaintiff provided to the EEOC provided sworn affidavits that they did not know that plaintiff was Hispanic. Additionally, the affidavits noted that plaintiff's national origin was not generally known because he does not have a Hispanic surname and he is light skinned.

The only materials plaintiff offers to avoid summary adjudication are his deposition testimony and his declaration. Plaintiff admits that he has no actual evidence that the individually named defendants knew that he was Hispanic. Rather, he declares that he merely thought they knew due to his general references about the fact that his mother is Hispanic and the fact that they were a "tight knit group". Beliefs, rumors, conjectures or wholly unsupported inferences are insufficient to establish a genuine issue that defeats summary judgment. *National Union Fire Ins. Co. v. Argonaut Ins. Co.*, 701 F.2d 95 (9th Cir. 1983).

Plaintiff argues that a document the City compiled in response to the EEOC's request for information on his EEOC claim proves that the City did know that he was Hispanic. However, as the defendants note, plaintiff's argument misrepresents the sequence of events. The City's evidence reveals that each defendant first came aware of plaintiff's national origin in December 1990 when the EEOC notified the City of Plaintiff's discrimination charge. Thereafter, the City referenced plaintiff as Hispanic on a document it prepared in response to the EEOC's May 20, 1991 request for information.

b) Discriminatory Pretext

Defendants persuasively argue that even if plaintiff could prove that they knew he was Hispanic, there is no evidence that the City acted with discriminatory motives. Plaintiff argues that discriminatory pretext explains his failure to receive promotion. However, this court finds that the facts preclude any inference of pretext.

First, plaintiff's disabling psychiatric condition was a legitimate business reason for plaintiff's failure to receive a promotion. Plaintiff remained eligible for promotion until his disability retirement. Plaintiff concedes that the City was justified in retiring him after his own psychiatrist reported plaintiff's "intense homicidal ideas" toward Chief Thompson. Furthermore, all the doctors suggested that plaintiff's disabling psychiatric condition was reason to place plaintiff on disability leave. Thus, the decision that led to plaintiff's retirement had nothing to do with his national origin.

Second, the reason that plaintiff was not promoted was because others were more qualified. Witnesses have corroborated the defendants' position that the plaintiff was inflexible and did not possess the type of judgment or communication skills necessary for promotion.

Third, the EEOC found no evidence of discrimination. Plaintiff contends that the EEOC investigator's determination that there was no discriminatory pretext lacks weight because there were no formal findings made. However, even in the absence of formal findings, courts recognize the EEOC's expertise in investigating discrimination complaints. *See Mitchell v. Office of Los Angeles Cty Sup. of Schools,* 805 F.2d 844. Moreover, the facts here indicate that the EEOC thoroughly investigated, reviewed each and every lead plaintiff provided, and notified plaintiff that there was no evidence to support pretext.

Thus, this court grants summary judgment on the Title VII claim and dismisses the pending state law claims pursuant to 28 U.S.C. § 1367(c)(3). Plaintiff's unsupported

beliefs about the defendants' racial motivations do not satisfy the Fed. R. Civ. P. 56(e) rule that affidavits must be based on personal knowledge to defeat summary judgment. Plaintiff has no personal knowledge about what the defendants knew or believed and he has submitted no evidence that they had a discriminatory pretext. On the other hand, defendants submit overwhelming evidence that plaintiff was not denied promotion because he was Hispanic. Since plaintiff has raised no triable issue regarding racial discrimination, summary judgment is appropriate. *McCabe v. General Foods,* 811 F.2d 1336 (9th Cir. 1987).

C. Sanctions

Defendants argue that attorneys fees should be awarded against plaintiff because he flatly failed to present credible evidence of racial discrimination. *See EEOC v. Bruno's Restaurant,* 976 F.2d 521 (9th Cir. 1992). The Ninth Circuit has noted that a district court must exercise caution in awarding fees to a prevailing defendant in order to avoid discouraging legitimate suits that may be airtight. *Id.* at 523. However, it noted the counter-argument that defendants need some protection from frivolous Title VII suits where the defense costs may potentially drive some employers out of business. The Ninth Circuit ultimately upheld the district court's award of attorneys fees in *EEOC* because the plaintiff failed to present credible evidence of discriminatory conduct. *Id.* Therefore, the court found the action was frivolous, unreasonable and without foundation. *Id.*

Additionally, defendants argue that both plaintiff and Mr. Gill should be sanctioned pursuant to Rule 11 for pursuing this frivolous claim because they were aware at the time they filed this complaint that the EEOC had already determined that there was no evidence of discrimination. Plaintiff argues that Mr. Gill cannot be subject to sanctions under Rule 11, even though he assisted plaintiff, because Mr. Gill did not actually sign the pleadings.

However, federal courts may sanction an attorney for pursuing a frivolous claim, regardless of whether the attorney has actually signed the pleading as required by Rule 11, pursuant to the court's inherent powers to prevent bad faith conduct. *Chambers v. Nasco,* 111 S. Ct. 2123 (1991). In any event, defendants argue that Mr. Gill is plaintiff's attorney of record because he entered into two retainer agreements with plaintiff, conducted discovery and has communicated with opposing party and the court on behalf of plaintiff.

The court finds defendants' arguments persuasive and concludes that sanctions are appropriate in this case. The court sanctions Mr. Gill and Mr. Warren to $5,000 each. This claim is clearly frivolous because plaintiff has submitted no evidence of discrimination other than his personal opinion that he was not promoted because the Chief was racist. He alleges no specific instances of conduct or words by the Chief which support his contentions.

CONCLUSION

Upon due consideration of the parties' memoranda and exhibits, the arguments advanced at hearing, and for the reasons set forth above, the court hereby grants defendants' motion for summary judgment. It further sanctions Mr. Warren and Mr. Gill to $5,000 each pursuant to Fed. R. Civ. P. 11.

DATED: April 20, 1993.

/s/ William B. Enright
WILLIAM B. ENRIGHT,
Judge
United States District Court

Copies to:
Plaintiff
Defendant

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

WILLIAM EARL WARREN III, Plaintiff, v. CITY OF CARLSBAD, BRIAN WATSON, JAMES THOMPSON, FRANK MANNEN, RAYMOND PATCHETT, STEWART GARY, and ANN JENSEN, Defendants.	Civil No. 92-0362-E (CM) **ORDER** (Filed April 21, 1993)

Upon due consideration of the parties' memoranda and exhibits, the arguments advanced at hearing, and for the reasons set forth above, the court hereby grants defendants' motion for summary judgment. It further sanctions Mr. Warren and Mr. Gill to $5,000 each pursuant to Fed. R. Civ. P. 11.

DATED: April 20, 1993.

/s/ William B. Enright
WILLIAM B. ENRIGHT,
Judge
United States District Court

Copies to:
Plaintiff
Defendant

United States District Court

Southern DISTRICT OF California

William Earl Warren III

V.

City of Carlsbad, Brian Watson, James Thompson, Frank Mannen, Raymond Patchett, Stewart Gary and Ann Jensen

JUDGMENT IN A CIVIL CASE

(Filed April 22, 1993)

CASE NUMBER: 92-0362-E (CM)

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[✓] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendants' motion for summary judgment is granted and court sanctions Mr. Warren and Mr. Gill to $5,000.00 each pursuant to Federal Rule of Civil Procedure 11.....

April 22, 1993
Date

DON E. HENDRIX
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Re: U.S.D.C. Civil No. 92-0362-3 (CM)

Case Title Warren v. City of Carlsbad, et al

You are hereby notified that a **CLERK'S JUDGMENT** in the above entitled case was filed and entered.

We also enclose for prevailing party a blank proposed bill of costs for your convenience. To aid you in completion of the proposed bill of costs, please refer to Southern District of California Local Rule 54.1, 28 U.S.C. 1920 and the case *Crawford Fitting Co. v. J.T. Gibbons Inc.*, 107 S. Ct. 2494 (1987). Unless by contractual obligation, attorneys fees are not considered costs and should not be included on the proposed bill of costs. I hereby certify that this notice was mailed on 4/22/93.

DON HENDRIX, CLERK

By /s/ M. Marner
Deputy

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 95-481

In The

Supreme Court of the United States

October Term, 1995

CITY OF CARLSBAD, BRIAN WATSON, JAMES THOMPSON, FRANK MANNEN, RAYMOND PATCHETT, STEWART GARY, and ANN JENSEN,

Petitioners,

v.

WILLIAM EARL WARREN, III,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF 82 CALIFORNIA CITIES AS AMICI CURIAE IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF INTEREST

Amici cities are political subdivisions from throughout the State of California. They file this brief in support of Petitioners' petition for writ of certiorari pursuant to United States Supreme Court Rule 37.5. As described below, amici have a direct interest in the legal issues presented by this case and request that this Court grant the petition for writ of certiorari.

One of the issues presented by Petitioners in this case is the proper standard to be applied by the courts in deciding summary judgment motions in employment discrimination cases under Title VII. Public agencies in general, and amici cities in particular, employ vast numbers of individuals in California. California cities have been significantly impacted by the overall sharp upsurge in employment discrimination litigation against both public and private employers. During the twenty years between 1970 and 1990 the total number of employment discrimination lawsuits filed nationwide each year grew twenty-fold. Howard A. Simon and Yaroslav Sochynsky, *In-House Mediation of Employment Disputes: ADR for the 1990s*, 21 Employee Relations L.J., pp. 28, 30 (Summer 1995). Just from 1992 to 1993 the number of employment discrimination lawsuits filed nationwide jumped 22%. *Id.* Amici cities, as employers, are faced daily with defending against lawsuits brought by employees who claim to be the victims of discrimination.

Employment discrimination lawsuits impact the amici cities in many ways. For example, when such lawsuits proceed to trial, they disrupt the day-to-day functioning of cities by diverting precious human resource hours to

tasks necessary to assist counsel in preparing for trial. In addition, cities which are often forced to defend unmeritorious employment discrimination claims through trial become hesitant to make certain necessary and legitimate business decisions, out of fear of being sued. This fear is magnified by the ever shrinking financial resources available to cities.

Finally, employment discrimination lawsuits can be extremely expensive to defend through trial. In the State of California, for example, the cost of defending an employment discrimination lawsuit through trial often reaches or exceeds $300,000. Simon and Sochynsky, *supra*, at 30. Because of the well-documented financial difficulties experienced by cities in California in the current economic times, such onerous litigation expenses can lead directly to a decrease in the funding available for other, necessary, public services provided by cities.

Therefore, amici cities have a legitimate interest in ensuring that they are not foreclosed from employing summary judgment, a tool provided by the law to avoid defending unmeritorious lawsuits through trial, in employment discrimination cases. Cities should only be required to defend, through trial, those lawsuits where the plaintiff offers evidence sufficient to raise a question of material fact in regard to the elements necessary to establish intentional discrimination under the standards set forth by this Court.

For these reasons, amici respectfully submit this brief in support of Petitioners' petition for writ of certiorari.

SUMMARY OF ARGUMENT

This Court has set out specific standards to be applied by trial courts in deciding summary judgment motions. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). This Court has also set forth the burden of proof which a plaintiff/employee must meet in order to prevail on a claim of employment discrimination under Title VII. *St. Mary's Honor Center v. Hicks*, 509 U.S. ___, 113 S. Ct. 2742, 125 L.Ed.2d 407 (1993). However, since this Court set forth the standards for employment discrimination cases in *St. Mary's*, the United States Circuit Courts of Appeals have applied conflicting standards in reviewing appeals from the grant of summary judgment in employment discrimination cases. Thus, there exists conflict and confusion among the Circuits regarding the appropriate burden of proof on summary judgment motions in employment discrimination cases which requires resolution by this Court. This confusion is demonstrated in this case by the Ninth Circuit's misapplication of the standards set forth by this Court in *St Mary's* and *Celotex*.

ARGUMENT IN SUPPORT OF GRANTING WRIT OF CERTIORARI

I. EMPLOYERS ARE ENTITLED TO SUMMARY JUDGMENT IN EMPLOYMENT DISCRIMINATION CASES WHERE THEY HAVE SHOWN THERE EXISTS NO MATERIAL ISSUE OF FACT AND THAT THEY ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW

Pursuant to Fed. R. Civ. P. 56(c), a defendant/employer is entitled to summary judgment in an employment discrimination case where there exists no genuine issue of material fact and the employer has demonstrated it is entitled to judgment as a matter of law. The purpose of summary judgment procedures is to allow for the expedient resolution of unmeritorious claims prior to trial. As such, "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett, supra,* 477 U.S. at 327.

II. THIS COURT HAS CLEARLY SET FORTH THE PLAINTIFF'S BURDEN OF PROOF WHICH MUST BE MET IN ORDER TO PREVAIL ON A CLAIM OF EMPLOYMENT DISCRIMINATION

Respondent in the present case sued Petitioners for discrimination under Title VII arising out of Petitioners' failure to promote Respondent to the position of fire captain. In order to establish a prima facie case of discrimination for failure to hire or promote, in violation of Title VII, a plaintiff must show that (1) he or she is a

member of a protected class; (2) he or she applied for and was qualified for a job for which the employer was seeking applicants; (3) he or she was rejected for the position despite his or her qualifications; and (4) the position remained open and the employer continued to offer promotions to persons of the plaintiff's qualifications. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). As such, a plaintiff's burden in establishing a prima facie case is not great. *Texas Dep't Of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

Once the plaintiff has come forward with sufficient evidence to establish a prima facie case, a "presumption" of discrimination is established. *Texas Dep't Of Community Affairs v. Burdine, supra*, 450 U.S. at 254. In order to rebut that presumption, the defendant must come forward and produce admissible evidence showing that the adverse employment action was taken for legitimate, nondiscriminatory reasons. *Id.* Pursuant to Fed. R. Evid. 301, however, the ultimate burden of persuasion remains at all times with the plaintiff. *Id.* at 253.

Once the defendant has satisfied its burden of production regarding a legitimate nondiscriminatory reason for the adverse employment decision, the "presumption of discrimination" created by the *McDonnell Douglas* framework drops away. *Texas Dep't Of Community Affairs v. Burdine, supra*, 450 U.S. at 255, n.10. Plaintiff must then carry the "ultimate burden of persuading the [trier of fact] that [he] has been the victim of intentional discrimination." *St. Mary's Honor Center v. Hicks, supra*, 113 S.Ct. at 2747-2748. The factfinder must not only find that the employer's explanation of the adverse employment

action is unbelievable, but also that the adverse action was the product of unlawful discrimination. *Id.* at 2751.

The Ninth Circuit Court of Appeals in this case incorrectly applied the framework of proof in employment discrimination cases in its review of the District Court's grant of summary judgment on behalf of Petitioners. Other Circuit Courts of Appeals have also misapplied the standards set forth in *St. Mary's* so as to conflict not only with other Circuit Courts of Appeals, but also with *St. Mary's* itself.

The conflicts and the confusion both in and among the Circuit Courts of Appeals are more fully set forth below.

III. THE CIRCUIT COURTS OF APPEALS HAVE APPLIED *ST. MARY'S* TO REVIEW OF SUMMARY JUDGMENT ORDERS IN SUCH A MANNER SO AS NOT ONLY TO BE IN CONFLICT WITH EACH OTHER, BUT ALSO AS TO BE IN CONFLICT WITH THE HOLDING OF THIS COURT IN *ST. MARY'S*

Following this Court's holding in *St. Mary's*, there has arisen a conflict among the Circuit Courts of Appeals as to the appropriate standard to be applied when reviewing an employer's motion for summary judgment in an employment discrimination case. The conflicting decisions have been divided into two general categories for discussion below: (1) "Pretext Plus", whereby a plaintiff seeking to avoid summary judgment must present evidence not only that the defendant's asserted reason for the employment action is pretextual, but that it is a

pretext for intentional discrimination; and (2) "Pretext Only", whereby a plaintiff may avoid summary judgment simply by presenting evidence disputing the defendant's proffered explanation for the employment decision.

The Circuit Courts of Appeals in fashioning the "Pretext Plus" and "Pretext Only" positions have rejected the relative opposing standard by dismissing it as originating from dicta in *St. Mary's*. For example, the Seventh Circuit in *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120 (7th Cir. 1994), adopted the "Pretext Only" position in regard to summary judgment. In rejecting "Pretext Plus" the court said:

> [a]s the dissent in *Hicks* points out, there is language in the Court's opinion that could support a finding that additional evidence of discrimination besides establishment of a prima facie case and rejection of the employer's proffered reasons for the plaintiff's discharge is required to prove intentional discrimination. However, such language is dicta. *Id.* at 1124, n.3.

Likewise, the Fifth Circuit in *Rhodes v. Guiberson Oil Tools*, 39 F.3d 537 (5th Cir. 1994), while adopting a "Pretext Plus" position in regard to standards for a motion for judgment as a matter of law in an age discrimination case, rejected as "dicta" language cited from *St. Mary's* allegedly supporting a "Pretext Only" position. *Id.* at 542.

These conflicting standards, and their implications, are more fully discussed below.

A. "Pretext Plus"

Courts in the First, Fourth, Fifth, and Sixth Circuits have applied the "Pretext Plus" standard, which amici cities believe is the correct one following *St. Mary's*. The "Pretext Plus" standard is illustrated by the Sixth Circuit's decision in *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796 (6th Cir. 1994). The male plaintiff in *Pierce* brought a claim under Title VII for reverse sex discrimination. Pierce, a supervisor, was demoted because of a determination by the defendant company that he sexually harassed a female employee. The only evidence presented by Pierce in opposition to the employer's summary judgment motion was that another female employee who engaged in similar conduct was not disciplined. The female employee, however, was not a management level employee. The court held:

> Even assuming, *arguendo*, that Pierce could establish a prima facie case, the district court was correct in determining that summary judgment in favor of Commonwealth was proper on the basis that Pierce offered no evidence that Commonwealth's proffered, nondiscriminatory justification for demoting Pierce was a pretext for discrimination. Because Commonwealth articulated a legitimate non-discriminatory reason for the demotion – an admitted violation by Pierce, who was a supervisor, of Commonwealth's sexual harassment policy – Pierce was required, in order to withstand summary judgment, to establish that the proffered reason was pretextual. Further, as the Supreme Court recently stated, establishing that the employer's reason was a pretext requires that a plaintiff do more than simply impugn the legitimacy of the

> asserted justification; in addition, the plaintiff must also adduce evidence of the employer's discriminatory animus. *Pierce v. Commonwealth Life Ins. Co., supra,* 40 F.3d at 804 (internal citations omitted).

Thus, the court clearly required plaintiff to show not only that the employer's reason was pretextual, but also that it was pretext for discrimination, in order to avoid summary judgment. Courts of the First, Fourth, and Fifth Circuits have required plaintiffs to make similar showings in order to avoid summary judgment in employment discrimination cases.[1]

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[1] *See, e.g., LeBlanc v. Great American Ins. Co.,* 6 F.3d 836, 842-843 (1st Cir. 1993) ("In this circuit, we have always required not only 'minimally sufficient evidence of pretext,' but evidence that overall reasonably supports a finding of discriminatory animus."); *Smith v. Stratus Computer, Inc.,* 40 F.3d 11, 16 (1st Cir. 1994) (once employer has rebutted prima facie case, "plaintiff must then introduce sufficient evidence to support two additional findings: (1) that the employer's articulated reason for the job action is a pretext, and (2) that the true reason is discriminatory."); *Henson v. Liggett Group, Inc.,* 61 F.3d 270, 275 (4th Cir. 1995) ("To withstand summary judgment, [plaintiff] must produce direct or circumstantial evidence 'of a stated purpose to discriminate [on the basis of plaintiff's protected status] of sufficient probative force to reflect a genuine issue of material fact.' " (citations omitted)); *Bodenheimer v. PPG Industries, Inc.,* 5 F.3d 955, 958 (5th Cir. 1993) ("We recognize that *St. Mary's* did not involve review of a summary judgment, whereas this case does. The case nonetheless is controlling as to what showing [plaintiff] must make to avoid summary judgment. In particular, because [plaintiff] would be required to prove at trial, through a preponderance of the evidence, that PPG's proffered reasons are a pretext for age discrimination, he must now produce sufficient evidence to establish that PPG's reasons were a pretext *for age discrimination.*").

Because of the enormous burden posed by defending an employment discrimination case through trial, it is critical that amici cities, and all employers, be permitted to avail themselves of summary judgment procedures. However, unless a plaintiff is required to come forward with evidence that discrimination was the real reason for the adverse employment action, which this Court in *St. Mary's* said is necessary to establish a case of employment discrimination, employers will be forced to defend unmeritorious claims through trial. The "Pretext Plus" standard utilized by courts in the First, Fourth, Fifth, and Sixth Circuits in employment discrimination cases properly allows defendants to obtain summary judgment in cases where the plaintiff cannot meet the appropriate burden of proof under *St. Mary's*.

B. "Pretext Only"

Courts in the Third, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have applied a standard whereby a plaintiff need only present evidence disputing the reasons given by the employer for the adverse employment action in order to avoid summary judgment. These courts do not require a plaintiff to meet the additional requirement of *St. Mary's* of showing that the reasons advanced by the defendant for the employment action is a pretext *for discrimination*.

For example, in *Howard v. BP Oil Company, Inc.*, 32 F.3d 520 (11th Cir. 1994), the court found that a plaintiff in an employment discrimination case need only show "evidence from which a jury could find that the articulated reasons are false" in order to create an issue of fact

sufficient to avoid summary judgment in an employment discrimination case. *Id.* at 525. The plaintiff in *Howard* claimed that the defendant failed to award him a BP station on the basis of his race. On summary judgment, the defendant presented evidence of several non-discriminatory reasons for the decision, including the experience of others who were awarded stations and familial relationships among those who were awarded stations. The plaintiff argued, in opposition to summary judgment, that the reasons proffered by defendant were inconsistent, subjective, and unworthy of credibility. However, plaintiff presented no additional evidence of discriminatory animus on behalf of defendant leading to the decision. The trial court, therefore, granted summary judgment.

The Eleventh Circuit Court of Appeals reversed, finding that the additional proof of discriminatory animus was unnecessary to avoid summary judgment.

> *St. Mary's* holds that *proof* that a defendant's articulated reasons are false is not *proof* of intentional discrimination; it is merely *evidence* of intentional discrimination. However, *evidence* of intentional discrimination is all a plaintiff needs to defeat a motion for summary judgment. That evidence must be sufficient to create a genuine factual issue with respect to the truthfulness of the defendant's proffered explanation. *Howard v. BP Oil Company, Inc., supra,* 32 F.3d at 525.

Courts in the Seventh, Eighth and Tenth Circuits have applied a similar analysis in their examination of summary judgment in employment discrimination cases.[2]

Courts in the Ninth Circuit have also applied a "Pretext Only" standard. In *Washington v. Garrett*, 10 F.3d 1421 (9th Cir. 1993) the court incorrectly applied *St. Mary's* when it found that plaintiff's evidence of pretext was sufficient to defeat the employer's summary judgment motion.

> Because, as *St. Mary's* recognizes, the factfinder in a Title VII case is entitled to infer discrimination from plaintiff's proof of a prima facie case and showing of pretext without anything more, there will always be a question for the factfinder once a plaintiff establishes a prima facie case and raises a genuine issue as to whether the employer's explanation for its action is true.

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[2] *See, e.g., Anderson v. Baxter Healthcare Corp., supra*, 13 F.3d at 1124 ("However, for summary judgment purposes, the nonmoving party, in this case the plaintiff, has a lesser burden. He must only 'produce evidence from which a rational factfinder could infer that the company lied' about its proffered reasons for his dismissal."); *Krenik v. County of Le Sueur*, 47 F.3d 953, 958 (8th Cir. 1995) ("To survive summary judgment at the third stage of the *McDonnell Douglas* analysis, a plaintiff must demonstrate the existence of evidence of some additional facts that would allow a jury to find that the defendant's proffered reason is pretext and that the real reason for its action was intentional discrimination. These additional facts may be limited solely to proof of pretext . . . "); *Durham v. Xerox Corp.*, 18 F.3d 836, 839-40 (10th Cir. 1994) ("Although a prima facie case combined with disproof of the employer's explanations does not prove intentional discrimination as a matter of law, it may permit the factfinder to infer intentional discrimination, and thus preclude summary judgment for the employer.").

> Such a question cannot be resolved on summary judgment. *Id.* at 1433.

In *Wallis v. J.R. Simplot Co.*, 26 F.3d 885 (9th Cir. 1994), while affirming the District Court's grant of summary judgment, the court applied a "Pretext Only" standard.

> In response to the defendant's offer of non-discriminatory reasons, the plaintiff must produce 'specific, substantial evidence of pretext.' In other words, the plaintiff 'must tender a genuine issue of material fact as to pretext in order to avoid summary judgment.' (internal citations omitted) *Id.* at 890.

The Ninth Circuit Court of Appeals' decision in the instant case enunciated another form of the "Pretext Only" standard for summary judgment in employment discrimination cases. This standard requires the employee to *either* provide evidence of discrimination *or* show that the employer's reasons for the decision were pretextual.[3]

> Thus, Warren's burden at the summary judgment stage is not great. He cannot, however, rely on generalizations. He must produce evidence of facts that either directly show a discriminatory motive or show that the City's

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[3] The Third Circuit Court of Appeals has applied a similar standard. In *Sempier v. Johnson & Higgins*, 45 F.3d 724, 731 (3d Cir. 1995), the court held that "[A] plaintiff who has made out a prima facie case may defeat a motion for summary judgment by *either* (i) discrediting the proffered reasons, either circumstantially or directly, or (ii) adducing evidence, whether circumstantial or direct, that discrimination was more likely than not a motivating or determinative cause of the adverse employment action."

> explanation for his rejection is not credible. *Warren v. City of Carlsbad*, 58 F.3d 439, 443 (9th Cir. 1995).

The court went on to find that the Respondent, who had proceeded on a "Pretext" theory, offered sufficient evidence to raise an issue of fact as to Petitioners' *motive* in not promoting him. *Id.* at 444. The court did not, however, make any determination as to the reasons offered by the Petitioners for the adverse employment action. Thus, the court below failed to apply the proper standard set out in *St. Mary's* requiring plaintiff to present evidence sufficient to raise a question of fact in regard to both the veracity of the employer's proffered reason for the employment action *and* whether the real reason was unlawful discrimination.

The effect of a "Pretext Only" analysis of summary judgment on employment discrimination claims is that almost every case where the plaintiff meets the burden on the prima facie showing, regardless of merit, will proceed to trial. Such a standard renders summary judgment a useless exercise, rather than an integral tool for the "just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett, supra*, 477 U.S. at 327. Not only does such a standard conflict with many of the other Circuit Courts of Appeals, but it also ignores the holding of *St. Mary's* that a plaintiff must prove both that the defendant's proffered reason for the employment action is pretextual, and that it is pretext for intentional discrimination. Such a conflict, as well as the use of an improper standard, merits resolution by this Court.

CONCLUSION

The summary judgment standard applied by the Ninth Circuit Court of Appeals to justify reversal in this case directly conflicts not only with this Court's holding in *St. Mary's*, but also with many other Circuit Courts of Appeals. Courts of Appeals throughout the United States are incorrectly requiring employers, including public agencies like amici cities, to defend unmeritorious employment discrimination claims through trial. This unjust result would be remedied if the Courts of Appeals uniformly applied the correct standard on summary judgment as set out by this Court in *St. Mary's* which requires the plaintiff to produce sufficient evidence to raise a genuine issue of fact that the reason offered by the employer for the challenged employment action was not only a pretext, but also that the real reason was intentional discrimination.

Summary judgment is an extremely important tool for the just and efficient resolution of all cases. The burdens upon amici cities, and all employers, of defending such cases through trial are great. Therefore, amici cities respectfully request that this Court grant Petitioners' petition for a writ of certiorari and resolve the issue of the appropriate standard to be applied on summary judgment in employment discrimination cases.

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Respectfully submitted,

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